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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

ROBBIE D. BISPO, Plaintiff, v. **AMERICAN WATER HEATER COMPANY** dba **US CRAFTMASTER; ROBERT SHAW CONTROLS COMPANY** dba **INVENSYS APPLIANCE CONTROLS** and dba **INVENSYS CONTROLS; LOWE'S HIW, INC.; BLUE STAR GAS SERVICE** dba **BLUE STAR GAS SERVICE LTD.; BLUE STAR GAS CO.; CHEVRON U.S.A., INC.;** and **FIRST DOE** through **TWENTIETH DOE,** Inclusive; Defendants. **AMERICAN GAS CONTROL VALVE COMPANY** and **LOWE'S HIW, INC.,** Third-Party Plaintiffs, v. **MICHAEL DEAN BISPO,** Third-Party Defendant.	No. 05-CV-01223-PK **PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS DIRECTED TO DEFENDANTS AMERICAN WATER HEATER COMPANY AND ROBERTSHAW CONTROLS COMPANY**

COMES NOW plaintiff, and moves the Court for an Order compelling production of documents by defendant Robertshaw Controls Company ("RCC") and American Water Heather Company ("AWHC"). In support of this of this motion, plaintiff will rely upon the provisions of Fed.R.Civ.P. 37, the points and authorities set forth hereunder, the exhibits attached hereto, and the Affidavit of J. Randolph Pickett, one of plaintiff's attorneys.

CERTIFICATE OF COMPLIANCE WITH LR 7.1 AND Fed/R.Civ.P. 37(a)(2)(A)

Plaintiff's attorneys and the attorneys for RCC and AWHC have conferred in a good faith effort to resolve the issues in dispute in this motion.

I. INTRODUCTION

On or about December, 1999 AWHC doing business as US Craftmaster manufactured a gas water heater, Model No. G1F4034T3PV, Serial No. 995112064, Product No. 0720053. This gas water heater was purchased by plaintiff's brother, Mike Bispo, during the year 2000 at the Lowe's home improvement center owned and operated by defendants Lowe's Companies, Inc. and Lowe's HIW, Inc. in Medford, Oregon. The water heater was initially installed by Mike Bispo, and later reinstalled by plaintiff, in a below grade enclosed basement area at 11907 Main Street, city of Fort Jones, county of Siskiyou, state of California. The gas control valve of the aforementioned water heater was manufactured by defendant RCC in approximately October of 1999, and was designated with Model No. 54-678-304.

The aforementioned gas water heater utilized LP gas. Plaintiff filled a portable storage tank holding approximately seven gallons with LP gas sometime during the two weeks prior to July 25, 2003, at a service station operated by defendant Chevron in Fort Jones, California. The LP gas that was purchased at the Chevron service station had been produced, formulated, processed, serviced, manufactured, designed, tested, inspected, distributed and/or sold by defendant Blue Star Gas Service.

On or before July 25, 2003, the gas control valve connected to the water heater failed to prevent the flow of LP gas to the water heater when no ignition method, i.e. the pilot light, was present. Because the gas control valve failed to prevent the flow of LP gas when no method of ignition was present, a dangerous level of LP gas was allowed to build up at floor level in the basement area where the water heater was located. When plaintiff attempted to light the pilot light the propane that had accumulated was ignited, engulfing plaintiff in flames. The fire resulted in plaintiff suffering burns over eighty-five percent of his body.

II. BASIS OF MOTION

Plaintiff seeks documents he which are sought in this motion as he intends to use the documents to generate evidence of (A) RCC and AWHCs' notice and knowledge of the defect; (B) the defective condition's (i) existence, (ii) dangerousness, and (iii) causal relation to plaintiff's injuries; and (C) that any risk/utility argument by either defendant RCC or AWHC is without factual merit.

Both RCC and AWHC, in their initial Responses to Plaintiff's First Request for Production of Documents (Exhibits B & C), objected to the production of any information regarding the gas control valve and/or water heater injuries involving any different model of control valve and/or water heater, other than RCC gas control valve R110RLPTSP and AWHC water heater Series 4034T (the model of the control valve and/or water heater involved in this incident), and further objected to the production of prior incident documents as overly broad, irrelevant and not likely to lead to the discovery of admissible evidence.

Defendant RCC and AWHC have likely received numerous reports of control valve and/or water heater incidents involving personal injury accidents and deaths. Plaintiff is entitled to this information, and cannot properly prepare for trial without it. Plaintiff is also entitled to documents related to other types or models of control valves and/or water heater accidents. The mere fact that a different model number is assigned by the manufacturer does not necessarily mean that any substantive difference exists between or among the various "models." Therefore, plaintiff should not be limited to other similar incidents solely related to the same model number.

III. PLAINTIFF REQUESTS RELEVANT AND ADMISSIBLE DOCUMENTS

Discovery requests are limited by Fed.R.Civ.P. 26(b)(1) as follows:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party***It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

In this case, plaintiff requested, among other things, the following documents from defendants RCC and AWHC (Exhibits B and C):

I. GAS CONTROL VALVE INJURIES AND DEATH / WATER HEATER INJURIES AND DEATHS

A. Incident Reports - All accident reports referencing, evidencing, or reflecting any control valve and/or water heater manufactured by RCC/AWHC involving any accident which occurred on or after January 1, 1980 (i) involving the control valve and/or water heater, (ii) resulting in injury or death to the operator of the control valve and/or water heater.

"B. Incident Studies - All document referencing, evidencing, or reflecting any study, report or record of any statistical breakdown of any type of control valve and/or water heater and/or propane explosion accident whether compiled by RCC/AWHC or by any other entity.

"C. Industry Documents - All documents referencing, evidencing, or reflecting any industry study, report, or record of any statistical breakdown of control valve and/or water heater incidents.

* * *

V. COMPLAINTS & LAWSUITS -

"A. Complaints - All complaints and answers filed in any lawsuit or other legal proceeding brought against RCC/AWHC and which relates at least in part to RCC's/AWHC's manufacture of gas control valve/water heater involving personal injury or death to an individual in close proximity to a gas control valve/water heater.

"B. Transcripts - All transcripts or other recordings of testimony, whether given during trial, hearing or deposition, of any person employed or engaged by RCC/AWHC as an expert witness, (ii) any employees of RCC/AWHC, or (iii) any government official, any part of the testimony of which relates to the use and/or safety of one of defendant's RCC/AWHC control valves/water heaters relating to personal injury or death of an individual in proximity to the control valve/water heater.

IV. OTHER INCIDENTS NEED ONLY BE SUBSTANTIALLY SIMILAR, NOT IDENTICAL

During the discovery phase of a case the parties are entitled to the production of documents that may not be admissible at trial. In analyzing the issue of admissibility of evidence of this type at trial, the Oregon Supreme Court and Oregon Court of Appeals have held that other injury incidents must merely be similar to Plaintiff's injury incident, and need not be identical. *Oberg v. Honda,* 316 Or. 263 851 P.2d 1084 (1993); *Lakin v. Senco Products, Inc.*, 144 Or.App. 464, 944 P.2d 957 (1997).

> Only substantial similarity, not complete identify of circumstances, is required. What elements must be similar will depend, of course, on the nature of the allegedly dangerous condition in each case.

Lakin, 144 Or.App., at 62 (citation omitted). See also *Downey v. Traveler's Inn,* 243 Or. 206, 412 P.2d 369 (1966) (other incidents admissible to prove condition and that condition caused injuries; reversible error to exclude evidence of other incidents). Here, the focus is on the defective condition, and can include other products with similar defects. *Lakin,* at 61, 64 (proper to admit testimony about incidents with other products, and proper to admit them where plaintiff's injury involved two defects and other incidents involved one or the other, but not both); *Oberg,* 316 Or., at 268 (proper to admit evidence of other incidents involving other manufacturers' products); *Waddil v.Anchor Hocking, Inc.*, 149 Or.App., 464, 468-69 (1997) (focus on facts of incidents and not legal theories).

Here, the design defect alleged is focused on the gas control valve and its incorporation into the water heater. Relevant incidents to show the defective condition and defendants RCC and AWHC's notice of it involve any model control valve and/or water heater which are fueled by a form of gas. AWHC and RCC are improperly attempting to limit the scope of discovery to the exact model involved in this incident. This patently disingenuous approach ignores the reality of corporate manufacturing and the use of similar component parts in different products using different model numbers. (*See* Exhibit D; deposition testimony of Emmanuel Castillo of RCC and Exhibit E; deposition testimony of Virgil Thompson of AWHC).

Oregon's appellate decisions in *Oberg, Lakin,* and *Waddill* show how broad the range of similar incidents is when plaintiff seeks to introduce such evidence at trial. As already stated, discovery is even broader, merely requiring the request to "appear reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1)..

V. OTHER INCIDENTS FROM OTHER MODELS ARE RELEVANT TO ESTABLISH A DEFECTIVE CONDITION

One of the issues to be decided may be the breadth of the time period for the incidents sought by plaintiff. Defendants RCC and AWHC would like to curtail the scope of discovery into other similar incidents in the narrowest time period possible. Plaintiff's attorneys requested incidents dating back to 1980 because time is irrelevant to proof of the defective condition. Moreover, incidents occurring after a defendant's manufacture of the subject product, and/or after the date of injury, can be relevant to punitive damages under ORS 30.925.

Additionally, the Oregon Supreme Court has held that other incidents occurring after the subject incident of the plaintiff, and offered to prove defective condition, are admissible. *Sunders v. A.M. Williams & Co.*, 155 Or. 1, 6-9, 62 P.2d 260 (1936) (reversible error to exclude same in action for negligence).

> In general, evidence of the occurrence of other accidents or injuries is not admissible where the issue is simply one of negligence or nonnegligence on a particular occasion, **except when** such other accidents or injuries and the one in question are **claimed to have been caused by a continuing defect or condition** or a continuing course of negligent action or conduct....To show the dangerous character of the place, method, or appliance, it is stated in 45 C.J. 1246, § 811, as follows: "Where the dangerous or safe character of the place, method, or appliance which is alleged to have caused the accident or injury is in issue, **evidence is admissible in a proper case that other similar accidents or injuries, actual or potential, have theretofore, or at the same time, or thereafter resulted at or from such place, method, or appliance**." (Emphasis added).

Id., 155 Or. at 7. See also *Rugemer v. Rhea*, 153 Or.App. 400, 957 P.2d 184 (1997) (subsequent transaction admissible to show pattern of conduct).

Again, the design defects alleged focus on the gas control valve and/or water heater. Here, plaintiff requested discovery of other incidents, in part to develop evidence concerning the defective condition's existence, dangerousness, and causal relation to plaintiff's injuries, and in part to develop potential evidence that might give rise to a claim for punitive damages.

VI. CONCLUSION

Plaintiff is entitled to the requested documents from defendants RCC and AWHC pertaining to control valves and/or water heaters. Without this information, plaintiff cannot properly prepare his case for trial.

DATED this 22nd day of January 2008.

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